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Court of Appeals

of the

State of New York

ACE SECURITIES CORP., Home Equity Loan Trust, Series 2006-SL2,
by HSBC Bank USA, National Association, solely in its capacity as Trustee
pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006,

Plaintiff-Appellant,

– against –

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE IN SUPPORT OF DEFENDANT-RESPONDENT

H. RODGIN COHEN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Tel.: (212) 558-4000
Fax: (212) 558-3588

BRENT J. MCINTOSH
JEFFREY B. WALL
SULLIVAN & CROMWELL LLP
1700 New York Avenue, NW, Suite 700
Washington, DC 20006
Tel.: (202) 956-7500
Fax: (202) 293-6330

Attorneys for Amici Curiae Chamber of Commerce of the United States of America and Business Roundtable

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CORPORATE DISCLOSURE STATEMENT

In accordance with Court of Appeals Rule 500.1(f), amici curiae state that each is a non-profit membership organization, with no parent company and no publicly traded stock.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Business Roundtable is an association of chief executive officers of leading U.S. companies with $7.2 trillion in annual revenues and nearly 16 million employees. Business Roundtable's members lead companies that represent more than a quarter of the total value of the U.S. stock market. By uniting and amplifying the diverse business perspectives and voices of America's top CEOs, Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

The Chamber and Business Roundtable frequently participate as amici curiae in cases that have the potential to affect significantly the drafting, enforcement, and viability of commercial contracts, and this is such a case. It is common for commercial contracts to contain representations and warranties, together with agreed-upon limitations of available remedies and pre-suit demand requirements for alleged breaches of those representations and warranties. These contractual terms serve to provide certainty and efficiency in the resolution of disputes over the truth of contractual representations and warranties.

Appellant here seeks to overturn the contractual bargains these terms represent by collapsing the distinction, which is well established in the doctrine governing statutes of limitation, between a breach of contract and the remedy for that breach. On appellant's approach, innumerable contracts would become subject to a shifting statute of limitations, triggered only once plaintiff makes a pre-suit demand for the agreed-upon remedy. Because that result would be inconsistent with commercial actors' expectations in adopting pre-suit demand procedures, would replace certainty with confusion, would render use of such procedures problematic, would undermine values central to New York's commercial law, and would harm businesses and consumers alike, the Chamber and Business Roundtable have a substantial interest in the Court's resolution of this case.

SUMMARY OF ARGUMENT

I. Two elements dictate the applicability of a statute of limitations: how long it runs, and from what event. The State of New York has established a generous six-year statute of limitations for breach of contract actions that begins to run upon a party's breach. Here, appellant claims that certain representations or warranties made in residential mortgage-backed loan securities are false, and accordingly that respondent DB Structured Products, Inc. (DBSP) must repurchase particular mortgage loans. Applying New York's statute of limitations to that situation is straightforward: the alleged *breach* is the making of the false representation or warranty, and the *remedy* for that breach under the agreements is repurchase of the allegedly defective mortgage loan. The statute of limitations runs from the former, and not any event connected to the latter.

Federal and state courts considering similar claims have overwhelmingly recognized, for statute of limitations purposes, the longstanding and common-sense distinction between breaches and remedies. Like the weight of that authority, the Appellate Division's decision respects the values of fairness and predictability that are central to New York commercial law, honors the balance that New York has struck between a plaintiff's opportunity to assert a claim and a defendant's need for eventual repose, and provides critical certainty to commercial parties in the drafting and enforcement of contracts.

II. Appellant's contrary view—*i.e.*, that New York's statute of limitations begins to run from a repurchase demand—would effectively extend the time limit on claims involving these securities to the life of the securitized loans plus six years, which could reach to more than a third of century. On appellant's view, as a practical matter, there simply would be no meaningful time limit. Unsurprisingly, this Court and other courts applying New York law have consistently rejected that sort of open-ended invitation to pursue litigation for decades.

Appellant does not seriously dispute that accepting its approach would have wide-ranging and often costly consequences for all manner of commercial actors and customers. It would touch subjects as diverse as interest rates, loan criteria, capital reserves, and contractual guarantees. Moreover, commercial contracts commonly attempt to achieve predictability in addressing breaches of contractual obligations by providing for specified remedies and pre-suit dispute resolution processes. Appellant's position (if accepted) would render dispute resolution under such contracts less predictable by subjecting them to a shifting statute of limitations, triggered only upon a plaintiff's pre-suit demand for the agreed-upon remedy. Permitting indefinite liability for a generation would disserve the values of certainty and predictability that are so important to New York commercial law.

ARGUMENT

A statute of limitations regime has two separate, but inextricably related, elements: (i) the duration of the period and (ii) the point in time from which the designated period runs. New York has sought to protect the interests of all affected parties by providing a generous period (six years) and a point certain from which the period runs (the date of breach). This creates both protection for the injured party and certainty and predictability for both parties, as well as for commercial transactions generally. In contrast, a statute of limitations period that runs from discovery of the breach, or even, as appellant appears to claim, from the demand for cure, creates prolonged uncertainty and exposure.

I. The Decision Below Provides Predictability To Commercial Parties In The Drafting And Enforcement Of Contracts.

As this Court well knows, private parties "overwhelmingly favor" the law of the State of New York "for financing contracts" and "prefer[] [New

York law] for most other types of contracts." Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475, 1478 (2009). New York has secured and preserved its position as the preeminent law for commercial activity in part based on its recognition that, in commercial matters, "reliance, definiteness and predictability are such important goals of the law itself, designed so that parties may intelligently negotiate and order their rights and duties." *In re Southeast Banking Corp.*, 93 N.Y.2d 178, 184 (1999). Indeed, "New York law has been developed with the goal of ensuring a stable, fair and predictable commercial law." *Final Report of the New York State Bar Association's Task Force on New York Law in International Matters* 5 (2011).

A policy of definiteness and predictability is particularly valuable in the interpretation of statutory time limits, which put parties on notice of the available period for bringing suit and imposing liability. In the contractual arena, New York provides that stability by striking a clear "[b]alance" between a plaintiff's "reasonable opportunity to assert a claim" and a defendant's "interest in repose." *Blanco* v. *Am. Tel. & Tel. Co.*, 90 N.Y.2d 757, 773-74 (1997); *see Martin* v. *Edwards Labs,* 60 N.Y.2d 417, 425 (1983) (statute of limitations "reflects the [defendant's] interest in defending a claim before his ability to do so has deteriorated through passage of time, on the one hand, and, on the other, the injured person's interest in not being deprived of his claim before he has had a reasonable chance to assert it"); *Victorson* v. *Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 403 (1975) (statute of limitations "depends on a nice balancing of policy considerations" between "a time after which . . . a defendant should not be harried" and "fairness to the claimant that he shall not unreasonably be deprived of his right to assert his claim").

Specifically, New York sets its statute of limitations for breach of contract actions at six years, longer than that of many other jurisdictions. *See* Cal. Civ. Code § 337 (four years); Del. Code Ann. tit. 10, § 8106(a) (three years); D.C. Code § 12-301(7) (three years); Md. Code Ann., Cts. & Jud. Proc. § 5-101 (three years). Unlike some of those other jurisdictions, though, New York commences the six-year period upon a party's breach, not when the counterparty discovers or should have discovered that breach. *Compare Ely-Cruikshank Co.* v. *Bank of Montreal*, 81 N.Y.2d 399, 403-404 (1993), *with Apr. Enterprises, Inc.* v. *KTTV*, 147 Cal. App. 3d 805, 832 (Cal. Ct. App. 1983); *Poffenberger* v. *Risser*, 290 Md. 631, 636 (1981). That rule—accrual upon breach—represents a considered "legislative judgment" that "occasional hardship" is "outweighed by the advantage of barring stale claims." *Ely-Cruikshank*, 81 N.Y.2d at 404.

Here, appellant claims that certain representations or warranties made in a residential mortgage-backed security were false, and accordingly that respondent DBSP must repurchase particular securitized mortgage loans. The Appellate Division correctly held that the application of New York's six-year statute of limitations to that situation is straightforward: the alleged *breach* is the making of the false representation or warranty (which occurred, if at all, in March 2006 at the time of the statements at issue), and the *remedy* for that breach under the agreements is a repurchase of the allegedly defective mortgage loan. Federal and state courts considering similar claims have consistently recognized the longstanding and common-sense distinction between breaches and remedies in repurchase litigation over mortgage-backed securities. *See* Resp. Br. 40-45 (collecting cases).

That approach provides contracting parties, and thereby the commercial system, with beneficial clarity and predictability: a plaintiff has six years from the date of an allegedly false representation or warranty to bring her claim. *See Ackerman* v. *Price Waterhouse*, 84 N.Y.2d 535, 542

(1994) (noting that "[t]he policies underlying a Statute of Limitations" of "fairness to [the] defendant and society's interest in adjudication of viable claims" require "a precise accrual date that can be uniformly applied"). The decision below thus supplies an easily administrable rule based on the time of the alleged wrong, which avoids the indeterminacy and uncertainty of focusing instead on when a party subsequently elects to pursue a remedy for that putative breach. *See MRI Broadway Rental, Inc.* v. *U.S. Mineral Prods. Co.*, 92 N.Y.2d 421, 428 (1998) ("[O]ur precedents have rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach.").

Applying New York's six-year limitations period as the Appellate Division did typically will allow contracting parties ample time to detect a breach and bring suit. *See, e.g., New York Telephone Co.* v. *Mobil Oil Corp.*, 473 N.Y.S. 2d 172, 190 (1st Dep't 1984) (noting that plaintiffs had "more than sufficient time" under existing statute of limitations to discover their claims); *Sears, Roebuck & Co.* v. *Enco Associates, Inc.*, 385 N.Y.S. 2d 613, 617-18 (2d Dep't 1976) (same). Certainly that has not been an issue in the context of residential mortgage-backed securities litigation. *See, e.g.*, NERA Economic Consulting, *Credit Crisis Litigation Update: It Is Settlement Time* 3, 10

(October 2013) (identifying 927 credit-crisis filings, including a "surge[]" of breach of contract cases in 2012 as many transactions approached expiration of a six-year statute of limitations).

At the same time, commencing New York's limitations period from a fixed date—*i.e.*, the making of the allegedly false representation or warranty—allows commercial actors to estimate more accurately their potential liability and prevents them from having to ward off stale claims based on unreliable or incomplete evidence. *See Gabelli* v. *SEC*, 133 S. Ct. 1216, 1221 (2013); *Duffy* v. *Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985). By doing so, knowable limitations periods let "businesses reduce the out-of-pocket costs associated with uncertainty, and allow those resources to be allocated to more socially beneficial uses." Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 454, 469 (1997). The decision below thus is "a reasonable means of achieving certainty in commercial transactions." *Menichini* v. *Grant*, 995 F.2d 1224, 1231 (3d Cir. 1993).

II. Appellant's Contrary Approach Would Create Substantial Uncertainty For A Wide Range Of Commercial Contracts Under New York Law.

Appellant's contention that the New York statute of limitations begins to run from a repurchase demand would dramatically extend time limits on suit—in matters such as this, by up to 500 percent, from six years to perhaps 36. After all, the loans at issue have 30-year terms. According to appellant, a plaintiff may make a repurchase demand at any point during that 30-year span, and the "claim for breach . . . [does] not accrue until DBSP actually refuse[s] to cure or repurchase the loans." App. Br. 20.* In other words, plaintiffs could have until the year *2042* to bring suit on these agreements. Appellant has not pointed to any other civil setting in which plaintiffs have nearly so much time to pursue claims under New York law. As a practical matter, appellant's approach would remove any meaningful time limit on its claims. *See Rodrigue* v. *Olin Employees Credit Union*, 406 F.3d 434, 447 (7th Cir. 2005) ("[L]engthening (here, more than doubling) the amount of

* The contract's requirement that the Trustee "promptly notify" the Sponsor of a known breach makes appellant's interpretation no more predictable, because appellant says that the prompt-notice requirement does "not obligate the Trustee to investigate" a potential breach. Br. 41-42. Thus, in appellant's view, the Trustee's only obligation would be to inform DBSP "within a reasonable timeframe" if it actually *knows* of a breach. *Id.* at 41.

time during which the parties . . . may be haled into court would be inimical to the goals of efficiency, certainty, finality, and uniformity.").

Moreover, each loan in a mortgage-backed security is subject to multiple representations and warranties, each of which can be independently breached. Under appellant's proffered rule, as to the very same loan, different breaches could give rise to different limitations periods, depending on when each breach becomes the subject of a repurchase demand. The same would be true of essentially any contract containing both multiple representations and warranties and a pre-suit demand requirement. Appellant's approach also could create substantial inequity. A contracting party could suspect the existence of a breach and yet postpone demanding a remedy until it determines whether the contract turns out advantageously or disadvantageously.

This Court and other courts applying New York law have consistently rejected that sort of blank check to pursue litigation for decades. *See Hahn Auto. Warehouse, Inc.* v. *Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 771 (2012) (rejecting the view that a plaintiff may "extend the statute of limitations indefinitely by simply failing to make a demand") (internal quotation marks omitted); *McCoy* v. *Feinman*, 99 N.Y.2d 295, 306 (2002) ("[New York] law cannot permit a limitations period to depend on a continuing omission that can go on for decades."); *Ackerman*, 84 N.Y.2d at 543 (rejecting an interpretation of a statute of limitation under which a "defendant would remain liable for work performed a decade ago" because it "would mean turning our backs on certainty and predictability, and proceeding along an indistinct trail with random and uncertain markings"); *see also Lehman Bros. Holdings, Inc.* v. *Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1194 (W.D. Wash. 2011) (applying New York law) (plaintiff in mortgage-backed securities litigation may not "essentially circumvent the statute of limitations by indefinitely deferring its demand for payment"); *Rodgers* v. *Roulette Records, Inc.*, 677 F. Supp. 731, 736 (S.D.N.Y. 1988) (allowing liability to run for decades would create "an unfair hardship on defendants since they would be potentially liable for wrongs committed in the distant past").

Appellant's contrary approach would inject significant uncertainty and substantial costs into commercial contracts formed under New York law. *See Ackerman*, 84 N.Y.2d at 542-43 (rejecting the argument that a statute of limitations for malpractice ran from the assessment of a tax deficiency, rather than the client's receipt of the faulty work product, because it would create an "utter lack of predictability"). Without question, it would meaningfully increase the already massive costs of mortgage-backed securities litigation. Parties to such litigation have encountered difficulties with stale evidence, including how to establish historical valuations for underlying properties many years later. The passage of time only increases the risk of "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Blanco*, 90 N.Y.2d at 773; *see id.* at 773-774 (noting the dangers of "unfairness to defendants of having to defend claims long past" and "possible plaintiff fraud where excessive factual inquiries would be necessary").

The confusion and uncertainty would extend far beyond litigation over mortgage securitizations, affecting commercial institutions of all sorts and their customers. It would become the prevailing litigation environment for all long-duration contracts, whether loans, leases, or supply contracts, that specify remedial procedures as to contractual representations and warranties. In the financial industry, substantially increasing the liability and costs associated with financing contracts could compel financial institutions to charge higher interest rates and impose stricter lending criteria. Financial institutions also could be required to keep more capital on hand to guard against protracted and uncertain liability, reducing the funds available to businesses and consumers.

Looking beyond financial institutions to the broad range of commercial actors whose activities are governed by New York law, appellant's preferred result would "engender uncertainties [for] untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world." *Bluebird Partners* v. *First Fid. Bank, N.A.*, 94 N.Y.2d 726, 739 (2000). It is common for commercial contracts to contain representations or warranties, together with limited and specified remedies in the event of a breach. That bargain is meant to promote efficiency and forestall expensive litigation. In appellant's view, however, all those contractual bargains would be not just undone but reversed: each contract would become subject to a shifting statute of limitations, triggered only upon plaintiff's pre-suit demand for the agreed-upon remedy. As this case shows, parties could face unanticipated liability for a generation or more.

The threat of such long-term liability can have dire economic consequences. For example, scholars have demonstrated that long periods of potential tort liability produce negative economic consequences. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1583 (1987) ("Many of the industries most severely affected by the [1980s] insurance crisis are those subject to tails of liability extending over long periods of time, thus incorporating an extraordinarily wide range of potential outcomes."); Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 261-62 (2013) (creating statutes of repose for products liability is "associated with statistically significant increases in economic activity").

Moreover, the result appellant urges would unsettle the expectations of commercial actors whose contracts already contain such pre-suit dispute resolution processes, and it would render any state adopting that result a less favorable situs for future commercial activity. *See J. Zeevi & Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975) ("In order to maintain [New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected."). Given the many decades through which New York has methodically cultivated a commercial law that is both fair and predictable, appellant's deviation from that path would have far-reaching consequences for New York's desirability as the forum of choice for commercial matters. *See* Eisenberg & Miller, 30 Cardozo L. Rev. at 1485 ("Unpredictable courts would undermine New York's campaign to attract contracts.").

It is little wonder then that in other contexts courts have refused to inject unpredictability into an otherwise knowable limitations period by collapsing the "well recognized" distinction between a contractual breach and the remedy for that breach. *Brainard* v. *Freightliner Corp.*, 2002 WL 31207467, at *3 n.12 (W.D.N.Y. Oct. 1, 2002); *see also Jackson* v. *Eddy's LI RV Center, Inc.*, 845 F. Supp. 2d 523, 534 (E.D.N.Y. 2012) ("Such 'repair or replace' language neither delays accrual nor creates a warranty separate and apart from the product warranty. Instead, such warranties do nothing more than limit Plaintiff's remedy in the event of breach."); *Ontario Hydro* v. *Zallea Sys., Inc.*, 569 F. Supp. 1261, 1266 (D. Del. 1983) ("[A] repair or replacement warranty merely provides a *remedy* if the product becomes defective."). The Appellate Division correctly honored that distinction in the decision below, which serves the values of definiteness and predictability that are critically important to New York commercial law.

CONCLUSION

For the reasons set forth above, amici curiae the Chamber and Business Roundtable respectfully submit that this Court should affirm the judgment below.

RESPECTFULLY SUBMITTED,

H. RODGIN COHEN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

BRENT J. MCINTOSH
JEFFREY B. WALL
SULLIVAN & CROMWELL LLP
1700 New York Avenue, NW
Suite 700
Washington, DC 20006
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